



**6450-01-P**

**DEPARTMENT OF ENERGY**

**10 CFR Part 710**

**RIN 1992-AA36**

**Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material: Technical Amendments**

**AGENCY:** Office of the General Counsel, Department of Energy (DOE).

**ACTION:** Final rule.

**SUMMARY:** DOE is amending its regulations at 10 CFR part 710, which sets forth the policies and procedures for resolving questions concerning eligibility for DOE access authorization, to revise a provision concerning designation of an acting official and to update the official's title. Specifically, the duties assigned to the Principal Deputy for Mission Support Operations (formerly, the Deputy Chief for Operations), Office of Health, Safety and Security, may now be exercised by a person or persons designated in writing as acting for, or in the temporary capacity of, that official. Currently, the part 710 regulations state that this official's duties may be exercised by another individual only in the official's absence. Today's final rule also revises one title: "Principal Deputy for Mission Support Operations" replaces "Deputy Chief for Operations".

**DATES:** *Effective Date:* This rule is effective on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Christina Pak, Office of the General Counsel, GC-52, 1000 Independence Avenue, SW, Washington, DC 20585; [Christina.Pak@hq.doe.gov](mailto:Christina.Pak@hq.doe.gov); 202-586-4114; Mark R. Pekrul, Office of Departmental Personnel Security, 1000 Independence Avenue, SW, Washington, DC 20585; [Mark.Pekrul@hq.doe.gov](mailto:Mark.Pekrul@hq.doe.gov); 202-586-3249.

## **SUPPLEMENTARY INFORMATION:**

### **I. Introduction**

10 CFR part 710 sets forth the policies and procedures for resolving questions concerning eligibility for DOE access authorization. Various DOE officials are assigned specific duties in this process. Currently, section 710.36 provides that each of the named officials, with the exception of the Secretary of Energy and the Deputy Chief for Operations, Office of Health, Safety and Security, may designate his or her duties to other DOE officials without restriction.

Since the part 710 rule was last amended in 2001, experience has demonstrated that conditioning the Deputy Chief for Operations' ability to delegate his part 710 functions solely on occasions when he is absent from the office is unduly restrictive, unnecessary, and administratively inefficient. In order to enhance the Department's ability to effectively manage the Administrative Review process prescribed by part 710, the Deputy Chief of Operations should be accorded greater flexibility in delegating his assigned responsibilities under the rule. In those cases where duties of the Deputy Chief of Operations are delegated pursuant to this amendment, they will continue to be exercised by a DOE employee in a security-related Senior Executive Service position within the Office of Health, Safety and Security, as approved by the Chief Health, Safety and Security Officer. In addition, DOE would update part 710 to reflect organizational changes within the Office of Health, Safety and Security by replacing "Deputy Chief for Operations" wherever it appears in the rule with "Principal Deputy Chief for Mission Support Operations".

The regulatory amendments in this final rule do not alter substantive rights or obligations under current law.

## **II. Procedural Requirements**

### *A. Review Under Executive Orders 12866 and 13563*

Today's regulatory action has been determined not to be "a significant regulatory action" under Executive Order 12866, "Regulatory Planning and Review," 58 FR 51735 (October 4, 1993).

Accordingly, this action was not subject to review under that Executive Order by the Office of Information and Regulatory Affairs of the Office of Management and Budget (OMB).

DOE has also reviewed this regulation pursuant to Executive Order 13563, issued on January 18, 2011 (76 FR 3281 (Jan. 21, 2011)). Executive Order 13563 is supplemental to and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866.

To the extent permitted by law, agencies are required by Executive Order 13563 to: (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.

DOE emphasizes as well that Executive Order 13563 requires agencies to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible. In its guidance, the Office of Information and Regulatory Affairs has emphasized that such techniques may

include identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes. DOE believes that today's rule is consistent with these principles, including the requirement that, to the extent permitted by law, agencies adopt a regulation only upon a reasoned determination that its benefits justify its costs and, in choosing among alternative regulatory approaches, those approaches maximize net benefits.

#### *B. Administrative Procedure Act*

The regulatory amendments in this notice of final rulemaking reflect a transfer of function that relates solely to internal agency organization, management or personnel. As such, pursuant to 5 U.S.C. 553(a)(2), this rule is not subject to the rulemaking requirements of the Administrative Procedure Act, including the requirements to provide prior notice and an opportunity for public comment and a 30-day delay in effective date.

#### *C. Review Under the Regulatory Flexibility Act*

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, "Proper Consideration of Small Entities in Agency Rulemaking," 67 FR 53461 (August 16, 2002), DOE published procedures and policies to ensure that the potential impacts of its draft rules on small entities are properly considered during the rulemaking process (68 FR 7990, February 19, 2003), and has made them available on the Office of General Counsel's Web site: <http://www.gc.doe.gov>. As this rule of agency organization, management and personnel is not subject to the requirement to provide prior notice and an opportunity for public comment

under 5 U.S.C. 553 or any other law, this rule is not subject to the analytical requirements of the Regulatory Flexibility Act.

#### *D. Review Under the Paperwork Reduction Act*

This final rule does not impose a collection of information requirement subject to the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

#### *E. Review Under the National Environmental Policy Act*

DOE has concluded that promulgation of this rule falls into a class of actions that would not individually or cumulatively have a significant impact on the human environment, as determined by DOE's regulations implementing the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*). Specifically, this rule amends existing regulations without changing the environmental effect of the regulations being amended, and, therefore, is covered under the Categorical Exclusion in paragraph A5 of Appendix A to subpart D, 10 CFR part 1021. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

#### *F. Review Under Executive Order 13132*

Executive Order 13132, "Federalism," 64 FR 43255 (August 4, 1999) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies

that have federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations (65 FR 13735). DOE has examined today's rule and has determined that it does not preempt State law and does not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. No further action is required by Executive Order 13132.

#### *G. Review Under Executive Order 12988*

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, "Civil Justice Reform" (61 FR 4729, February 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. Section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this final rule meets the relevant standards of Executive Order 12988.

#### *H. Review Under the Unfunded Mandates Reform Act of 1995*

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires each Federal agency to assess the effects of a Federal regulatory action on State, local, and tribal governments, and the private sector. DOE has determined that today’s regulatory action does not impose a Federal mandate on State, local or tribal governments or on the private sector.

#### *I. Review Under the Treasury and General Government Appropriations Act, 1999*

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

#### *J. Review Under the Treasury and General Government Appropriations Act, 2001*

The Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516, note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guideline issued by OMB. OMB’s guidelines were published at 67 FR 8452 (February 22, 2002), and DOE’s guidelines were published at 67 FR 62446 (October 7, 2002). DOE has reviewed today’s rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

#### *K. Review Under Executive Order 13211*

Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,” 66 FR 28355 (May 22, 2001) requires Federal agencies to prepare and submit to the Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget, a Statement of Energy Effects for any proposed significant energy action. A “significant energy action” is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use. Today’s regulatory action is not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

#### *L. Congressional Notification*

As required by 5 U.S.C. 801, DOE will submit to Congress a report regarding the issuance of today’s final rule. The report will state that it has been determined that the rule is not a “major rule” as defined by 5 U.S.C. 801(2).

#### *M. Approval by the Office of the Secretary of Energy*

The Office of the Secretary of Energy has approved issuance of this rule.

## **List of Subjects in 10 CFR Part 710**

Administrative practice and procedure, Classified information, Government contracts, Government employees, Nuclear materials.

Issued in Washington, DC, on November 26, 2012.

**Gregory H. Woods,**

*General Counsel.*

For the reasons stated in the preamble, DOE amends part 710 of chapter III, title 10, Code of Federal Regulations, as set forth below:

### **PART 710 – CRITERIA AND PROCEDURES FOR DETERMINING ELIGIBILITY FOR ACCESS TO CLASSIFIED MATTER OR SPECIAL NUCLEAR MATERIAL**

- 1. The authority citation for part 710 is revised to read as follows:

**Authority:** 42 U.S.C. 2165, 2201, 5815, 7101, *et seq.*, 7383h-l; 50 U.S.C. 2401 *et seq.*; E.O. 10450, 3 CFR 1949–1953 comp., p. 936, as amended; E.O. 10865, 3 CFR 1959–1963 comp., p. 398, as amended, 3 CFR Chap. IV; E.O. 13526, 3 CFR 2010 Comp., pp. 298-327 (or successor orders); E.O. 12968, 3 CFR 1995 Comp., p. 391.

#### **§§ 710.9, 710.10, 710.28, 710.29, 710.30, 710.31, and 710.32 [Amended]**

- 2. Sections 710.9(e); 710.10(f); 710.28(c)(2); 710.29(a), (b), (c), (d), (f), (g), (h), (i) ; 710.30(b)(2); 710.31(a), (b), (d); and 710.32(c) are amended by removing the words “Deputy Chief for Operations” and

adding, in their place, the words “Principal Deputy Chief for Mission Support Operations” wherever they appear.

■ 3. Section 710.36 is revised to read as follows:

**§ 710.36            Acting officials.**

Except for the Secretary, the responsibilities and authorities conferred in this subpart may be exercised by persons who have been designated in writing as acting for, or in the temporary capacity of, the following DOE positions: The Local Director of Security; the Manager; the Director, Office of Personnel Security, DOE Headquarters; or the General Counsel. The responsibilities and authorities of the Principal Deputy Chief for Mission Support Operations, Office of Health, Safety and Security, may be exercised by persons in security-related Senior Executive Service positions within the Office of Health, Safety and Security who have been designated in writing as acting for, or in the temporary capacity of, the Principal Deputy Chief for Mission Support Operations, with the approval of the Chief Health, Safety and Security Officer.

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